THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR1944/12

DAVID CHAUKE **Applicant**

and

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **First Respondent**

THE MINISTER OF POLICE **Second Respondent**

COMMISSIONER F J VAN DER MERWE, *N.O.* **Third Respondent**

THE MINISTER OF LABOUR **Fourth Respondent**

Heard: **13 August 2015**

Delivered: **10 September 2015**

Summary: **Application for review in terms of s. 158(1)(g) of the LRA; Applicant seeking to set aside a Condonation Ruling; Second Respondent raising an 'Exception' to the application for review in terms of Rule 23 of the Uniform Rules of Court; Exception in motion proceedings incompetent and bad in law; On the merits of the review, no case made out for the setting aside of the Condonation Ruling; Application dismissed with no order as to costs.**

JUDGMENT

VOYI AJ

Introduction:

[1] This is an application to review and set aside a Condonation Ruling issued by the Third Respondent (hereinafter "*the Commissioner*") on 26 July 2012 under case number PSSS 446-07/08. In so issuing the Ruling under review, the Commissioner was acting under the auspices of the First Respondent, Safety and Security Sectoral Bargaining Council (hereinafter "*the SSSBC*").

[2] The application for review is brought in terms of s 158(1)(g) of the Labour Relations Act,[1] read together with s 145 of the same Act. It was filed with this Court on 21 August 2012. The application is opposed only by the Second Respondent.

Preliminary observations:

[3] After the review application was delivered and on 28 August 2012, the First and Fourth Respondents delivered a notice of their intention to oppose.[2] In further resisting the review, the Second Respondent took exception to the manner in which the application was framed and to what was contained in the affidavit in support thereof. In this regard to the latter and on 08 October 2012, the Second Respondent delivered what it labelled as its "…*Notice to the Applicant in terms of Rule 11 of the Labour Court Rules read with Rule 23 of the High Court Rules*."

[4] The aforementioned Notice raised a few complaints against the Applicant's application for review. In essence, the Second Respondent complained that the Applicant's application for review (i) constituted 'an irregular proceeding' and (ii) 'was excipiable' on the basis that it lacked averments necessary to sustain a cause of action and that it contained averments that are vague and embarrassing.

[1] Act 66 of 1995 as amended ("the LRA").
[2] In the end however, it was only the Second Respondent that persisted with opposing the matter.

[5] It was mentioned in the aforesaid Notice that "…*if the Applicant does not remedy the defects within 15 days of receipt of [the] notice the Second Respondent will apply to this Honourable Court to set aside the Application on the grounds that it constitutes an irregular proceeding and / or is vague and embarrassing and fails to disclose a cause of action*."[3]

[6] The Applicant did not remedy the alleged defects. Instead, he delivered what he termed a 'Replication to Second Respondent's Notice to the Applicant in terms of Rule 11 of the Labour Court Rules read with Rule 23 of the High Court Rules.'

[7] In his purported 'Replication', the Applicant rejected the Second Respondent's assertions that his application for review constituted an irregular proceeding and/or that same was excipiable. The Applicant tabulated his reasons for disagreeing with the Second Respondent. These somehow went into the merits of his overall case against the Second Respondent.

[8] With the Applicant having failed to remedy the identified defects, the Second Respondent delivered what it labelled as an 'Exception'. The 'Exception' was grounded on the Applicant's application for review (i) lacking averments necessary to sustain a cause of action and (ii) containing averments that are vague and embarrassing.

[9] I need to say something about the Second Respondent's approach in resisting the application for review. I do so before delving into the merits of the review.

The 'Exception' to the application for review:

[10] The approach adopted by the Second Respondent in resisting the review application involves the importation of the provisions of Rule 23 of the Uniform Rules of Court into proceedings before this Court. Such an approach is permissible under Rule 11(3) of the Rules of the Labour Court, the provisions of which read as follows:

[3] In the Second Respondent's Notice under discussion, no distinction seems to be drawn between the provisions of Rule 23 and Rule 30 of the Uniform Rules of Court. Rule 23 deals with exceptions and applications to strike out whereas Rule 30 deals with irregular proceedings.

> "*If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any approach that it deems appropriate in the circumstances*."

[11] There is no provision in the Rules of the Labour Court that deals with Exceptions and/or Irregular Proceedings. It is, by now, accepted that an Exception can be raised in proceedings before this Court through reliance on Rule 11, read together with Rule 23 of the Uniform Rules of Court.[4]

[12] There is, accordingly, no controversy in raising an Exception to a claim brought under Rule 6 of the Rules of the Labour Court.[5] What I, however, need to deal with in this matter is the permissibility of an Exception in motion proceedings before this Court. This necessitates an analytical look at the provisions of Rule 23 of the Uniform Rules of Court. Rule 23(1) reads as follows:

> "*Where any **pleading** is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filling any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception*." [own emphasis]

[13] It is evident from the above that the Exception contemplated by Rule 23 is directed at a 'pleading'. In this matter, we are dealing with a notice of motion accompanied by an affidavit.

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[4] *Van Rooy v Nedcor Bank Ltd* (1998) 19 *ILJ* 1258 (LC); *Eagleton & Others v You Asked Services (Pty) Ltd* (2009) 30 *ILJ* 320 (LC) at para 15; *Charlton v Parliament of the Republic of SA* (2011) 32 *ILJ* 2419 (SCA) at para 16; *De Klerk v Cape Union Mart International (Pty) Ltd* (2012) 33 *ILJ* 2887 (LC) at para 18.
[5] *Ibid.*

[14] In my considered view, there is a material distinction between a 'pleading' and an 'affidavit'. In *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa,*[6] the following is stated:

> "*In South Africa the term 'pleading' is used in a more restricted sense and does not include documents such as petitions, notices of motion, affidavits, simple summons, provisional sentence summons or writs of arrest*."

[15] In *AB Civils (Pty) Ltd t/a Planthire v Barnard*,[7] the LAC held thus:

> "*An affidavit is not a pleading. It is a means of putting evidence before the court. It takes the place of viva voce testimony.*"[8]

[16] In this matter, the Second Respondent's 'Exception' is, therefore, not directed at a 'pleading' but at the 'affidavit' in support of the review application. In my opinion, that is incompetent. The provisions of Rule 23(1) specifically make reference to instances where "*…any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence*."

[17] The Uniform Rules of Court do not permit Rule 23 to be applicable in motion proceedings. In affirming this, I refer to the decision of Schippers J in *WP Fresh Distributors (Pty) Ltd v Klaaste*,[9] where the following was held:

> *"Rule 23(1) provides inter alia that where any pleading is vague and embarrassing or lacks averments necessary to sustain an action, the opposing party may deliver an exception thereto and may set it down for hearing; provided that where a party intends to take an exception that a pleading is vague and embarrassing, the opponent must be given an opportunity of removing the cause of complaint. However, in applications there is no recognized procedure for raising an exception before the case comes to trial. Instead, rule 6(5)(d) requires any person opposing an order*

[6] 5th Ed., Vol. 1, Juta & Co. Ltd, at p. 558.
[7] (2000) 21 *ILJ* 319 (LAC).
[8] At para 7.
[9] (16473/12) [2013] ZAWCHC 95 (23 April 2013); 2013 JDR 1616 (WCC).

> *sought in the notice of motion to notify the applicant in writing that he or she intends to oppose the application; and to deliver an answering affidavit within 15 days of the notice of intention to oppose. If a respondent intends to raise only a question of law, he or she is required to deliver a notice of this intention, setting forth the question of law. Thus a respondent who wishes to raise a preliminary point that a case is not made out in the founding papers, must do so in the answering affidavit. This construction is buttressed by rule 6 (14) which expressly states that rules 10, 11, 12, 13 and 14 apply mutatis mutandis to all applications. Rule 23 is not one of them.*" [10]

[18] In the present matter, I come to the considered view that the Second Respondent's 'Exception' to the application for review is bad in law and can, therefore, not stand.

[19] The Second Respondent had an opportunity to deliver an answering affidavit and, instead, elected to follow an approach not envisaged in motion proceedings. In *Bader & Another v Weston & Another*,[11] it was held as follows:

> "*…where a respondent has had adequate time to prepare his affidavits, he should not omit to prepare and file his opposing affidavits and merely take the preliminary objection. The reason for this is fairly obvious. If his objection fails, then the Court is faced with two unsatisfactory alternatives. The first is to hear the case without giving the respondent an opportunity to file opposing affidavits: this the Court would be most reluctant to do. The second is to grant a postponement to enable the respondent to prepare and file his affidavits. This gives rise to an undue protraction of the proceedings, which cannot always be compensated for by an appropriate order as to costs and results in a piecemeal handling of the matter which is contrary to the very concept of the application procedure*."[12]

[10] At para 5.
[11] 1967 (1) SA 134 (C).
[12] At 136H - 137B.

[20] In my view, it would not serve the object of speedy and expeditious resolution of labour disputes to afford the Second Respondent a further opportunity to deliver an answering affidavit now that I have disallowed the 'Exception'.[13] I will, accordingly, deal with the matter in the absence of an answering affidavit from the Second Respondent.

[21] The matter was, in any event, not enrolled solely for the purposes of deciding on the Second Respondent's 'Exception'. The notice of set down issued by the Registrar on 27 January 2015 informed the parties that "*[t]he review application has been set down for hearing on the opposed motion roll … on the 13th day of August 2015 at 10:00*."

[22] At the hearing of the matter, the parties were nevertheless allowed to canvass all the issues arising without them being confined to arguments only on the Second Respondent's 'Exception'. I, therefore, have to deal with the merits of matter on the basis of application for review as it stands.

Evaluation:

[23] The disposal of the Second Respondent's 'Exception' does not mean that the Applicant's application for review ought to, automatically, succeed.

[24] It must still be determined if, indeed, the Commissioner's Condonation Ruling should be reviewed and set aside on the basis of what the Applicant alleges in his founding affidavit.

[25] In view of the findings reached above in relation to the Second Respondent's 'Exception', it seems to me that the matter must be considered on the basis of whether indeed a case has been made out in the Applicant's review application for the primary relief he seeks, namely the setting aside of the Commissioner's Condonation Ruling.

[13] The provisions of Rule 11(4) of the Rules of the Labour Court provide that this Court may, in the exercise of its powers and in the performance of its functions or in any incidental matter, act in a manner that it considers expedient in the circumstances to achieve the objects of the LRA.

[26] In as much as the Applicant's application for review contains a convoluted catalogue of peculiar claims,[14] the review and setting aside of the Condonation Ruling is the only relief the Applicant is entitled to seek in the matter before me. This in view of the fact that the referral of *inter alia* his unfair dismissal dispute was refused by the Commissioner on account of it being exceedingly out of time.

[27] The other claims the Applicant articulates in his papers are simply not properly before me and they, therefore, stand to be disregarded. I now turn to the Condonation Ruling and the grounds advanced for its setting aside.

[28] Having been dismissed in or about April 2008, the Applicant referred his alleged unfair dismissal dispute to the SSSBC. This he did only in June 2012. As the referral was late, an application for condonation was necessary and same was delivered by the Applicant. The said application came before the Commissioner for a Ruling.

[29] In his Condonation Ruling, the Commissioner reasoned as follows:

> *"11. It is trite that in applications of this nature the following factors are relevant : Extent of the delay; the explanation for the delay; the prospects of success in the main dispute / complaint; prejudice to both sides (also called the balance of convenience); and some authorities add the importance of the matter. These factors are inter-related, although it is generally accepted that if there is an inadequate explanation or if there are little prospects of success, condonation need not be granted.*
>
> *12. In this particular case the delay is very excessive. Assuming that there was a dismissal during or about March or April 2008, the referral now is just over 4 years late.*
>
> *13. I have found it very difficult to discern a coherent explanation for this long delay. The fact that the applicant was embroiled in various*

[14] These claims are for *inter alia* (i) losses incurred due to alleged unfair labour practices with regard to certain project software estimated between prices ranges of R480 million to R1.3 billion, (ii) compensation for lost property at the value of R46 million, (iii) compensation for missing property confiscated with net value of R250 million; (iv) lapsed investments and insurance business covers worth R1.5 million. The founding affidavit deals at length with the alleged basis for these claims.

court cases in my view does not provide a reasonable explanation for the delay. A diligent litigant would have done much more much sooner to pursue his complaint of unfair dismissal.

14. Even if arguably the applicant may have some prospects of success in the matter of the original complaint of misconduct against him, it would be severely prejudicial to expect of the respondent to deal with that dispute at this time. It is well known that SAPS often has problems in finding and obtaining the co-operation of members of the public in complaints against employees, moreso after such a long period. It is also quite probable that the applicant as reservist is not an employee as contemplated in the LRA.

15. Bearing in mind the long delay, inadequate explanation, and the balance of convenience favouring the employer, I conclude that the applicant has not shown good cause for condonation".

[30] Having deliberated on the Applicant's application for condonation as per the preceding paragraphs, the Commissioner ultimately ruled that "*[c]ondonation for the late referral of the unfair dismissal is not granted*."

[31] As indicated herein before, I have to consider whether a case is made out for the setting aside of the Commissioner's Ruling. As correctly pointed out by the Second Respondent's Counsel, Advocate S Tilly, during the hearing of the matter, the only discernable grounds for review that can be ascertained from the entire hodgepodge in the founding affidavit are those contained at paragraphs 5.1 to 5.3 thereof. It would be useful to quite these in their entirety. They read as follows:

"5.1 There was a defect on the condonation ruling award in that the matter was reported around 2007 for unfair labour practices. It was given the same case number of PSSS 446-07/08 and processes underway were abandoned no award was ever served. Recently when I referred the matter for condonation of unfair dismissal the matter as given the same case number of PSSS 446-07/08 in 2012.

5.2 The commissioner exceeded his powers in that there was gross irregularity in the conduct of the arbitration proceedings.

The award has been improperly obtained in that the same case number of matter reported in 2007 is still subject to debates in the council in 2012. There is no proper explanation as to why this matter was not conciliated during the processes of 2007 when it was referred. From December that is enough period that is approximately three months until 11 March 2008 before sentence and conviction also when I was still available for this matter to be heard. This is within the ambit of the prescribed period on which the Bargaining Council should have adjudicated this matter on their roll a failure which is also a gross irregularity.

5.3 This matter was declined condonation in 2012. That delay is also too excessive, but who bares the blame if not the bargaining council. There is nowhere in between this processes of four years that the council decided to address the matter or refer it to Court to make a decision. It is only when I made an inquiry into the outstanding dispute and redoing the referral in 2012 as advised to do so by senior commissioner in the CCMA that this ruling is made. The commissioner committed a gross irregularity in that he has adjudicated two referrals in a single interval that have been referred at different time frames, by so doing he exceeded his powers as the commissioner."

[32] It is my considered view that these allegations are simply inadequate to upset the Commissioner's Ruling. None of what the Applicant states in his founding affidavit, as grounds for review, lays any justifiable and valid basis for the setting aside the Condonation Ruling.

[33] In my judgment, the Commissioner's Condonation Ruling falls within the realm of what is a reasonable decision under the circumstances.

[34] The Commissioner was dealing with a dispute that was late by over four (4) years. Such delay is beyond excessive. It is quite remarkable. It was the Commissioner's viewpoint that "…*it [was] very difficult to discern a coherent explanation for [the] long delay*."[15]

[15] At para 13 of the Condonation Ruling.

[35] The Commissioner went on to reason that a "…*diligent litigant would have done much more much sooner to pursue his complaint of unfair dismissal*."[16] I cannot agree more.

[36] To take over four (4) years in lodging an unfair dismissal claim is simply inexcusable. To the extent that the incarceration of the Applicant may justify the delay, it only lasted for no more than twelve (12) months. Such incarceration can, therefore, not serve as an excuse for such an extraordinary delay. All things considered, the Commissioner's Ruling can, therefore, not be faulted.

[37] It is, accordingly, my conclusion that the Applicant's application for review fails to make out a case for the primary relief he seeks, which is to review and set aside the Commissioner's Condonation Ruling. Consequently, the application for review stands to be dismissed.

[38] In this matter, there is no necessity for awarding any costs order as neither party is successful in their respective cases as advanced in the papers before me. The Second Respondent's 'Exception' is declined and the Applicant's application for review is refused.

Order:

[39] I, accordingly, make the following order:

i. The Second Respondent's 'Exception' is dismissed.
ii. The Applicant's application for review is dismissed.
iii. There is no order as to costs.

[16] *Ibid.*

VOYI AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	In person
On behalf of the Second Respondent:	Adv Sumayya Tilly, instructed by The State Attorney (Johannesburg)